No. 1899

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CATHERINE D. STEAD et al.,
Appellants,

vs.

ISABELLA M. CURTIS et al.,
Appellees.

BRIEF FOR APPELLEES.

Appeal from the Circuit Court of the United States for the Northern District of California by Complainants from the Final Decree Sustaining the Demurrers of Defendants, and Dismissing Their Original Amended Bill.

(On Rehearing.)

J. C. CAMPBELL,
WALTER SHELTON,
Solicitors for Appellees Isabella M. Curtis, John M. Curtis, Elizabeth M. Muir Mugan, William G. Mugan, and the Jacob Z. Davis Estate Company.

Filed this.....day of February, 1913.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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STATEMENT OF THE CASE.

1. *Introductory.*—This appeal has already been the subject of frequent consideration by this court, and the facts and issues therein presented must undoubtedly be familiar. This statement is therefore made very brief, containing simply an outline of the material facts in issue with references to the transcript and serving as an explanatory index of the discussion to follow.

2. *Relief Sought.*—The first and fundamental purpose of this suit is to have it determined that

Jacob Z. Davis died intestate. The United States Circuit Court sitting in California was asked by original bill in equity to take jurisdiction of this suit and decide, without any probate judgment or order to that effect and with a valid probate decree to the contrary, that Jacob Z. Davis died leaving no will and that appellants, as his heirs, are therefore entitled to his estate. This result is sought upon the following statement in the amended original bill of complaint.

3. *Demise of Deceased.*—While a resident of the City and County of San Francisco, State of California, Jacob Z. Davis died on the 28th day of October, 1896, leaving estate in said City and County of the value of more than $1,000,000 (Trans. pp. 195-208).

4. *Will and Petition for Probate.*—Shortly thereafter, on the 16th day of November, 1896, appellees, Mrs. Muir and Mrs. Curtis, filed their petition in the Superior Court of the City and County of San Francisco, praying that the following document, then and there produced, be admitted to probate as the last will and testament of Jacob Z. Davis, deceased:

> "Oct 1st 1896
>
> I Jacob Z Davis Will and bequeath every thing I have in this world to my beloved nieces Lizzie Muir and Belle Curtis
>
> Jacob Z. Davis."

(Trans. pp. 223, 226, 227.)

5. *Probate Proceedings and Decree.*—Thereupon the clerk of said court issued, signed and sealed, a notice to the effect that on November 30, 1896, at 10 o'clock A. M., at the courtroom of Department 10 of the Superior Court, said will would be proved. At the time set for such hearing appellants appeared and filed certain written grounds of opposition to said petition setting forth that appellants were heirs of decedent and that said will was a forgery, which said petitioners answered to the effect that said will was valid, having been written entirely by the hand of said Jacob Z. Davis. Appellants thereupon demanded a jury, and after a trial of forty-six days beginning on May 17, 1897, and ending August 16, 1897, a verdict was rendered against appellants as contestants, and by judgment entered upon said verdict on the 17th day of August, 1897, said will was admitted to probate, and said petitioners were appointed administratrices with the will annexed. They then took possession of the property belonging to said estate as such administratrices and continued so to hold said property until distributed to them by final decree on May 4, 1904. (Trans. pp. 231, 234, 237, 253, 343, 229, 291).

6. *Objections to Jurisdiction of Probate Court. Lack of Citation.*—It is alleged, however, that said judgment of probate is wholly void and not merely voidable, for several reasons. In the first place it is said that no notice of the hearing of said petition

for probate was ever given as required by Section 1303 of the Code of Civil Procedure, and that no proof of the giving of such notice was ever made. This allegation is made, however, in the face of the fact that after the appearance of appellants on the very day set for hearing in said notice and after a trial of forty-six days, and while appellants were still before the court, the decree was made and entered finding that proof of service of notice as required by said Section 1303 had been made, and notwithstanding the further fact that appellants were present and took an active part in said hearing and at that time were occupying the position of plaintiffs invoking the probate jurisdiction of said court and asking it to declare said will a forgery (Trans. pp. 232, 233, 234, 237, 343).

7. *Probate Jurisdiction. Lack of Necessary Parties.*—The second ground upon which appellants seek to have this court treat the probate decree as wholly void, is based upon the averment as to lack of notice above set forth, and the further statement that decedent left surviving him certain heirs besides appellants who never appeared in said court "in any proceeding or case for the admission of said pretended will to probate or in any contest of said pretended will or in any proceeding or case in anywise relating to the admission of said pretended will to probate". This averment is made in flat contradiction of a subsequent statement in the bill that *all* of the heirs of said Jacob Z. Davis appeared

in said probate proceeding admitting said will to probate, and applied for relief against said probate decree, and by motion therein to a judge of said Superior Court sought to obtain and make a bill of exceptions to be used as a record on appeal, and that all the heirs of said Jacob Z. Davis attempted to take an appeal from said probate decree to the Supreme Court of this state; unless, however, we construe the quotation as referring only to proceedings prior to said probate decree and as in no wise disputing the fact that all of said heirs appeared in said probate proceeding after the will had been admitted to probate and even prior to the expiration of one year after such probate (Trans. pp. 235, 263, 357, 358).

8. *Probate Jurisdiction. Transfer and Continuances.*—It is also stated in the bill that various continuances of the probate proceedings were had, two of them *sine die,* and that said proceedings were transferred from Department 10 to Department 9 of said Superior Court without there ever having been published or served a notice of such continuances and transfers in accordance with Section 1303 of the Code of Civil Procedure. Appellants seek to have the probate decree treated as a nullity on this ground, although it is shown that appellants appeared at the hearing of the petition for probate and continued to appear after such continuances *sine die* without objection and participated in the proceedings until judgment, and how

long and to what extent thereafter appellants have not seen fit to say (Trans. p. 235).

9. *Probate Jurisdiction. Formal Invalidity of Will.*—The fact that the will shows on its face that the date thereon does not include a place, is made the basis of an argument to the effect that such an omission is sufficient to render the will void on its face; and that, therefore, the probate decree is a nullity notwithstanding the fact that the Superior Court acting as a probate court of general and exclusive jurisdiction, admitted it to probate, thereby adjudging said will to have been executed by decedent according to the forms of law (Trans. p. 347).

10. *Probate Jurisdiction. Disqualification of Jurors.*—And as a final objection against the validity of the probate decree it is alleged that four of the jurors were disqualified because of interest, being the secret agents of appellees Mrs. Muir and Mrs. Curtis and others, and that the judgment based thereon is totally void even though the judge who rendered the decree was qualified to act (Trans. pp. 237, 242).

11. *Probate Jurisdiction. Appellants' Theory.*—In view of these arguments, appellants contend that they are before the court in the same situation as if there had never been any probate proceedings whatsoever, and that the bill should be treated as praying only for the cancellation of the deeds and not as asking for any relief whatsoever against a

probate decree. But they do not, however, rest their case upon this position alone. They go further and, assuming the decree to be valid because rendered with jurisdiction of the subject matter, the *res,* and the parties, they ask for relief against the probate decree on a showing which they denominate as extrinsic fraud, consisting of the next following averments.

12. *Allegations of conspiracy.*—That prior to the death of Jacob Z. Davis, appellees Mrs. Muir, Mrs. Curtis and others, entered into a secret conspiracy with the purpose of seizing upon and appropriating to themselves all the property then owned by Jacob Z. Davis to the exclusion of his next of kin and heirs, and formed the design to accomplish said conspiracy by any and every means within their power (Trans. p. 216).

13. *Charge of Forgery.*—That after the death of Jacob Z. Davis appellees Mrs. Muir and Mrs. Curtis and others, by counterfeiting the hand writing of said deceased, forged the will in suit (Trans. pp. 222, 223).

14. *Averment of Spoliation of Evidence.*—That said appellees took possession of all the property and effects of deceased immediately upon his death and made a search by breaking open safes and lockers and going through the private papers and effects of deceased, and discovered and destroyed certain documents which if produced would have

proved the forgery of the will. It is also alleged that appellants broke open the urn containing the ashes of the wife of deceased (Trans. pp. 224, 225).

15. *False Testimony.*—That on May 24, 1897, appellee, John M. Curtis, falsely testified that said will was found by him on the 4th day of November, 1896, in the urn containing the ashes of the wife of decedent (Trans. p. 244).

That Alexander Boyd falsely testified that he had a conversation with decedent on October 2, 1896, in which decedent told him that he had made his will providing for the girls, meaning appellees, Mrs. Muir and Mrs. Curtis (Trans. p. 245).

That John C. Senderling, on June 14, 1897, falsely testified that the hand writing of the will in suit was that of decedent (Trans. p. 250).

16. *Suppression of Testimony.*—That said appellees so importuned William H. Senderling that he refused to disclose a conversation which he had with decedent just prior to his death, to the effect that decedent had not yet made a will. That when questioned by appellants' attorneys, said William H. Senderling refused to disclose said conversation (Trans. pp. 220, 246, 249).

17. *Disqualified Jurors.*—That said appellees procured four men as their agents to attend the trial of the will contest, who secretly caused themselves to be accepted as jurors upon said trial and

that through said jurors said appellees made and rendered said verdict (Trans. pp. 237, 242).

18. *Summary of Misconduct.*—That Mrs. Muir and Mrs. Curtis and their confederates, in furtherance of said design, and by causing four of their confederates to be members of said jury, and by preventing evidence from being introduced before said jury or in said court, and by suborning false witnesses and producing false evidence before said jury, caused the verdict of said jury to be rendered in court, and by means of said verdict caused the judgment and order of court admitting said will to probate to be made and filed.

19. *Execution and Delivery of Deeds.*—That appellees Mrs. Muir and Mrs. Curtis, in May, 1898, offered to the firm of attorneys who represented appellants $100,000 if they would have appellants and Elizabeth Wilson and her four children execute deeds conveying all their interest in the Davis estate to said appellees, and would represent to appellants and said Elizabeth Wilson and her four children that said deeds when executed and delivered would extinguish all the interest of said claimants in and to said estate, and that said appellants accompanied said offer with the representation and threat that they would continue to hold all the property of said estate and would by means of said probate decree prevent said claimants from obtaining any of said estate unless said

offer was accepted. That said attorneys communicated said offer and representation to said claimants, who believed said representation, accepted said offer, executed said deeds and delivered them to appellees Mrs. Muir and Mrs. Curtis. It is further alleged that the money paid for said deeds was a part of said estate and that said appellees obtained said deeds by means of said probate decree while the claimants were ignorant of the technical objections now urged against it, although they had already contested the will and asserted that they knew it to be a forgery (Trans. pp. 273, 285).

20. *Averments of Fraud Concluded.*—This is a complete statement of averments upon which appellants rely to establish their claim of extrinsic fraud in the probate proceeding. But these things all took place more than ten years before this suit was instituted. Wherefore the delay?

21. *Laches.*—It appears from the bill that all the wrongs complained of except the adverse possession of the property involved, were completed in June, 1898, more than ten years before the institution of this suit. Immediately after the death of decedent, appellants sent their agent to California, who employed attorneys and contested the validity of the will, and in so doing appellants asserted knowledge on their part that said will was a forgery and that decedent died intestate, and

also spent forty-six days in court trying to convince a jury of the truth of these averments. They then and there asserted that they knew a fraud was being perpetrated upon them by means of said alleged forgery, and the alleged perjured testimony of various witnesses to the effect that said will was genuine. They had knowledge of these alleged facts when they executed and delivered the deeds releasing their claims, and made such releases with the belief and understanding that they were surrendering all their rights in said estate. With knowledge of said alleged wrongs they surrendered their alleged rights, and acquiesced for more than ten years. It further appears that meanwhile appellees have occupied and held the exclusive possession of the property involved (Trans. pp. 267, 273).

22. *Alleged Excuses for Laches.*—Appellants seek to avoid the lawful consequences of this long lapse of time by alleging that they resided outside the State of California, were poor and unable to come here and ascertain the facts in the case, but it is further shown by the bill that they were represented by agents and attorneys here until the execution and delivery of said deeds, and they appear to have been well represented in view of the allegation that $12,500 was expended in the preparation and assertion of their claims (Trans. pp. 197-200, 233, 234).

23. *Ignorance of California Law and Defects in Judgment.*—Notwithstanding the fact that appellants were represented here by their agents and attorneys, it is also averred that appellants were ignorant of the organization and character and practice of the Superior Court and of its various departments, and of the orders of court transferring said probate proceeding from Department 10 to Department 9 thereof, and of the various orders continuing the hearing of said probate proceeding *sine die,* although those things were matters of law and of public record. It is also alleged that appellants and their attorneys in the will contest were ignorant of the law of California relative to the dating of olographic wills, and that appellants were likewise ignorant of every invalidity and defect in the judgment and order purporting to admit said pretended will to probate and consisting either of the said court's want of jurisdiction of the subject matter of said probate proceeding or of any omission or insufficiency of notice or of any irregularity in the empanelment of the jury, until the 25th day of June, 1906, although it is further shown that these things, including the jury panel, were matters of law and of public record in the very proceeding in which appellants were represented by said attorneys (Trans. pp. 258-260).

24. *Ignorance of Alleged Destroyed Writings.*—It is further alleged that appellants never learned

of the alleged writings of Jacob Z. Davis, which it is stated were deposited by him in his safes and were destroyed by appellees Mrs. Curtis, Mrs. Muir and others, until the month of July, 1908, and it is further alleged that appellants were prevented from discovering these facts by the concealment thereof by said appellees, but it is nowhere alleged of what the said acts of concealment consisted, or how or by what means appellees discovered the alleged existence of the said writings or the alleged fact of their destruction, in July, 1908, and appellants have also failed to allege any facts or circumstances whatsoever which would have prevented them in the exercise of due diligence from having discovered said alleged facts before or during the trial of said will contest (Trans. p. 243).

25. *Ignorance of Senderling's Testimony.*—The bill also avers that the appellants did not discover the alleged fact that William H. Senderling had a conversation with decedent immediately prior to his death, in which he stated that he had made no provision by way of will for appellees Mrs. Muir and Mrs. Curtis, until in July, 1908, when it is alleged said Senderling disclosed said alleged conversation to appellants. It is further alleged in the bill that appellants made inquiry of said Senderling whether he had any knowledge relating to the issues in said will contest, but that said Senderling refused to disclose the alleged fact of said conversation with decedent (Trans. pp. 265-266).

26. *Discovery of Facts.*—The bill does state, however, that appellants obtained the information of the various matters and things of which they allege they were ignorant, through a certain attorney of San Francisco, on June 25, 1906, who gave them such information voluntarily, without employment by them. It appears from the bill that said attorney had never been employed by appellants in said probate proceeding. The bill is silent as to how or under what circumstances said attorney obtained knowledge of the alleged facts upon which appellants now seek relief, and it does not appear when said attorney obtained such information, or that he possessed any special or peculiar advantage which enabled him to ascertain said alleged facts, or that appellants' attorneys in said probate proceeding, by the exercise of ordinary diligence, could not have ascertained all the facts of which appellants claim they were ignorant and presented the same to the Superior Court in said probate proceeding. The jury panels and lists referred to in the bill were matters of public record, and it is not stated that the officer's return of the venire was not subject to inspection by appellants' attorneys at all times, nor is any fact stated to show that appellants' attorneys in said contest proceeding could not have ascertained all the facts of which appellants allege ignorance, before or at the time said probate decree was rendered except, perhaps, the testimony of Senderling (Trans. p. 262).

27. *Delay After Discovery.*—A reading of the bill reveals the fact that notwithstanding the discovery of said alleged facts on June 25, 1906, no proceeding was instituted or relief asked for in equity until the filing of this bill more than two years afterwards. Appellants allege, however, in their bill, that certain proceedings were instituted in the state courts, but by amendment expressly aver that the relief now sought was not applied for (Trans. pp. 263, 357, 358).

28. *Proceedings in California Courts.*—It is also alleged in the bill that appellants and all the other heirs of decedent appeared in the Superior Court of the City and County of San Francisco in said probate proceeding shortly after June 25, 1906, and began and thereafter with all possible diligence prosecuted, certain proceedings applying for relief to said Superior Court and to the Supreme Court of the State of California in that proceeding. That said proceedings were only an attempted appeal by appellants and said other heirs to said Supreme Court from said probate decree, and a motion by appellants and said other heirs in said Superior Court to obtain and make a bill of exceptions to be used as a record on said appeal, and an action in said Supreme Court against the judge of said Superior Court for a writ of mandamus to compel him to settle and allow said bill of exceptions. That said proceedings by appellants terminated on the 30th day of April, 1908, with the refusal of said

courts to allow any remedy (Trans. pp. 263, 357, 358).

29. *Symptoms of Decedent's Last Illness.*—The bill contains certain allegations describing decedent's last illness but does not undertake in anywise to state the cause producing such symptoms and finally death. Neither does the bill state that such symptoms were the effect of any specific or particular cause. Furthermore, the particular cause of such symptoms as are described in the bill is not a fact of common knowledge which could be assumed without a statement of such cause in the bill. No fact whatsoever is stated in the entire bill which could in any way connect appellees Mrs. Muir and Mrs. Curtis with the cause of decedent's death. The only facts stated which, according to appellants' contention, have even the remotest connection with the subject, are that said appellees desired to own the estate of decedent, that they were present with him at the time of his death and that they caused his remains to be cremated after death. But there is nothing unusual in the fact of cremation, and it was rather the natural thing to be expected in view of the further fact stated in the bill that decedent himself had only a few weeks prior to that time cremated the last remains of his own wife.

30. *Conclusion.*—It is upon this state of facts that appellants are now seeking relief and ask to

have relitigated their alleged claims which have already been presented many times to all the courts of this state and have been passed upon by the court below and are now before this court for consideration the third time. Let us proceed to a consideration of the legal effect of these allegations.

BRIEF AND ARGUMENT.

I.

Jurisdiction of Superior Court in Probate Proceeding.

31. *Introductory.*—In order to a recovery of any relief in this suit, it is necessary for appellants to establish the ultimate fact that Jacob Z. Davis died intestate. To this end the court is asked to decide that the probate proceedings set forth in the bill are absolutely void for want of jurisdiction. Various objections to support this position are urged and will now be considered.

32. *Want of Notice.*—The first objection urged in this connection is to the effect that no notice was ever given in said probate proceeding in accordance with Section 1303 of the Code of Civil Procedure. As already pointed out in the statement, such an allegation appears in the bill, but the probate decree which is also set forth decides the fact that due proof of the notice required by said section of

the statute was made at the hearing. And it further appears from the bill that appellants were present at said hearing and participated therein; they were in fact as well as in law the moving parties in said contest proceeding, and they, instead of appellees, were at that time invoking the jurisdiction of the Superior Court in this proceeding (Section 1312, C. C. P.).

34. *A final judgment finding jurisdictional facts which were in issue in an adversary proceeding made after the appearance of both parties is res judicata, and such issue cannot be again litigated.*

1 Black on Judgments, Section 274, and cases there cited;

Sipe v. Copwell, 8 C. C. A. 419; 59 Fed. 970.

Thus it is said in *1 Black on Judgments,* Section 274:

> "The fact of its own jurisdiction may become a matter in issue before the court, or a question which it must determine before proceeding with the case, and then its decision that it has jurisdiction is generally considered final and conclusive in all collateral inquiries. When the jurisdiction of a court depends upon a fact which it is required to ascertain in its decision, such decision is binding until reversed in a direct proceeding. Where a statute confers general jurisdiction over a class upon a particular tribunal, its decision upon the facts

> essential to the existence of jurisdiction in a particular case belonging to the class will be conclusive as against collateral attack. So when a notice which is defective, or the service of which is informal, has been adjudged sufficient, the judgment rendered thereunder will not be held void in a collateral proceeding. And in case of an insufficient service of notice, if the court decides the question of jurisdiction erroneously, the judgment will be voidable but binding until reversed on appeal. The determination of the question of the sufficiency of the affidavits presented to the court as proof of the service of a summons and the failure of the defendant to answer, is a judicial determination of the question of jurisdiction, and therefore binding until set aside or reversed."

The cases supporting this conclusion are quite distinguishable from the cases cited by appellants to the effect that the jurisdictional recitals in a judgment may be contradicted. The jurisdictional fact in those cases was not an issuable fact in controversy, but appeared in the judgment merely by way of recital and generally in the absence of the objecting party.

It therefore follows that in this case, where the issue of notice *vel non* was before the Superior Court for adjudication and the appellants were there participating in the decision on this issue, the

judgment of the court thereon has all the dignity and conclusiveness of a judgment upon any other issue in the case, is just as binding and conclusive, and appellants' allegation to the contrary must therefore be disregarded.

35. *Want of Notice Waived by General Appearance.*—Whatever may be the conclusion reached as to whether or not the bill does or can show want of the statutory notice, any such want of notice is wholly cured by the appearance of all the parties in interest in this proceeding. Appellants appeared in the probate proceeding prior to entry of the probate decree and contested the will. The remaining heirs appeared in the probate proceeding after the probate of the will and took various steps consisting of a motion to obtain a bill of exceptions and an attempted appeal to the Supreme Court. The bill does not undertake to state the nature of the appearance in said probate proceeding or to state what grounds of exception such remaining heirs sought to raise against that proceeding. In the absence of an express allegation to the contrary, the appearance will be taken to have been general, and as an inference of fact it is but reasonable to assume that said heirs other than appellants appeared for the purpose of excepting to said probate proceeding upon all the grounds of which they had knowledge and believed to be valid. If that be true, such grounds of exception include an objection against the alleged false testimony as well as an

objection to the disqualification of the jurors in that proceeding. Such an appearance therefore must have been general, and is in all respects the legal equivalent of a voluntary appearance before probate.

36. *Any appearance after final judgment, except a special appearance for the purpose of objecting to the jurisdiction alone, is a general appearance, waiving lack of notice.*

O'Dell v. Rogers, 44 Wis. 136, 174, 175, 176;
Douglass v. Pacific Mail S. S. Co., 4 Cal. 304;
Mayer v. Mayer, 39 Pac. (Ore.) 1002;
Anderson v. McClellan, 102 Pac. (Ore.) 1015;
Welch v. Ladd, 116 Pac. (Okla.) 574, 575;
Lookabaugh v. Epperson, 114 Pac. (Okla.) 738;
Burdette v. Corgan, 26 Kans. 102;
Barnett v. Holyoke, 97 Pac. (Kans.) 962;
4 Am. & Eng. Ency. Law and Practice, 1005.

O'Dell v. Rogers, 44 Wis. 174, deals with this point upon a state of facts identical with those in suit. A statement of the conclusion there reached is set forth in the following language:

> "Has she done anything since becoming of age tantamount to an appearance at the time and place of the probate, or in assent thereto, or in recognition thereof? This court held, in Blackburn v. Sweet, imp., 38 Wis. 578, and

many other cases, *in effect,* that when the moving party asks some relief which can only be granted upon the hypothesis that the court has jurisdiction of the cause and the person, this is a submission to the jurisdiction, and waives all defects in the service of process; and that where a party seeks to take advantage of a want of jurisdiction, he must object *on that ground alone,* and keep out of court for every other purpose. This is the only safe and consistent rule in all cases of a want of jurisdiction of the person, by defective service or notice, which may be waived by an appearance. In August, 1876, Emma A. Hewitt, then being of full age, joined in a petition to the county court of Milwaukee county, setting forth the want of sufficient publication of notice of the time and place of the proving of the will, and that no notice was personally served on the persons interested therein, as the only ground for showing that the county court in probate had no jurisdiction to make the order or decree admitting said will to probate. * * * She charges that Celestia A. O'Dell and George W. O'Dell, pretending to act as executrix and executor, and Rogers, Burnham and Becher, took possession of the estate and converted it to their own use, and have never accounted; that said estate has been wrested from the petitioners and other heirs by a cunningly de-

> vised system of fraud, etc.; * * * And that the decree is void for want of authority in the court to make it, and by reason of the fraud practiced upon the court and the heirs of said estate. The prayer asks, first 'that the probate of the will and all orders and proceedings in this matter be set aside'; secondly, 'and for such other and further relief as may be just and proper'. * * * The petition and complaint most fully and clearly place the said Emma A. Hewitt in the attitude which this court has so frequently held is equivalent to an appearance to the proceeding sought to be declared void for want of notice; and operate as an assent and submission to the proceedings of the court in the probate of the will and the appointment of executors. For the purposes of this case, therefore, we must hold said proceedings valid as to all the parties.''

Under the facts alleged in the bill, the appearance of the remaining heirs must be taken to be general and not necessarily for the purpose of objecting only to the jurisdiction of the court, and consequently must be treated as falling within the operation of the principle just elucidated in the Wisconsin case.

37. *General Appearance a Valid Substitute for Notice.*—But appellants argue that notice in accordance with Section 1303 of the Code of Civil

Procedure is a prerequisite to jurisdiction of the subject matter and cannot be waived. Such a contention is undoubtedly erroneous.

38. *A general appearance in a proceeding to probate a will is the full equivalent of the notice required by Section 1303 of the Code of Civil Procedure.*

Section 1306, C. C. P.;
Abila v. Padilla, 14 Cal. 103;
Curtis v. Underwood, 101 Cal. 669;
Estate of Ricks, 160 Cal. 472;
Estate of Kearney, 13 Cal. App. 95.

Appellants make the statement in their complaint notwithstanding the decree that due proof of service was made, that the notice required by Section 1303 of the Code of Civil Procedure was never given, and it is argued that for this reason the Superior Court never acquired jurisdiction of the subject-matter of the proceeding and was therefore without power to render a valid decree; and that this is true even though all the appellants, either in person or through their privies, appeared generally and contested the probate of the will in suit. In support of this position it is contended that in matters of this kind, when the legislature provides a course of procedure, every other mode of procedure is excluded; that the notice provided for in Section 1303 is a condition precedent to the right of the Superior Court to hear a petition for the probate of a will; that such notice is the *sine qua non*

without which the court has no jurisdiction of the subject-matter, and that an appearance of the parties cannot serve as a substitute because jurisdiction of the subject-matter cannot be waived by consent or general appearance. This contention of appellants is, however, contrary to the statute and law of this state, as construed by our Supreme Court. Section 1303 as originally enacted was interpreted in keeping with the general law in regard to the service of process, in the case of:

Abila v. Padilla, 14 Cal. 103.

The appellant in that case appeared in a probate proceeding to contest a will before probate, and filed an answer to the petition. After having been defeated, he raised the point on appeal that there had been a failure of notice as required by the statute, and that the court was consequently without jurisdiction. It was decided that the point was not well taken because, said the court,

> "The answer gave the court jurisdiction of the party and it is perfectly immaterial whether a citation ever issued".

This construction of Section 1303 of the Code of Civil Procedure has since been strengthened by positive legislative enactment in Section 1306, C. C. P. That section, as originally adopted into the Code, provided simply that proof of notice must be made at the hearing. In 1873, the latter section was amended so as to require proof of notice *"unless the parties appear";* thereby dispensing with

proof, and consequently with notice itself, in such cases. The Supreme Court had occasion to consider this section in the case of

Curtis v. Underwood, 101 Cal. 669,

and repudiated appellants' contention in the following language:—

> "The clause quoted provides for cases in which a postponement has been had, *and that proof of service is not necessary as to parties who appear,* and in this latter respect is in line with the doctrine enunciated in *Abila v. Padilla,* 14 Cal. 103, where it was held *that as to parties who appeared notice was waived.*"

These decisions were lately approved in

Estate of Ricks, 160 Cal. 471,

in the following terms:—

> "But appellant is not in a position to raise any question of defective issuance or service of the citation upon him on the grounds suggested, because he waived the right to object to the manner of issuance and service of the citation by voluntarily appearing in the proceeding."

From the foregoing it must clearly appear that a general appearance of the parties in interest is a complete equivalent of the notice required by Section 1303, C. C. P.; that such an appearance effectually dispenses with such notice and clothes the

court with jurisdiction as fully as could the notice provided for in that section.

39. *Probate Decree Without Notice Not Void for Want of Interested Parties.*—The bill expressly shows an appearance of all the heirs in this proceeding at one time or another. Appellants have nevertheless disregarded that showing and argued that they alone appeared and that owing to lack of notice and the failure of some of the heirs to appear the probate decree is without jurisdiction. The authorities are to the contrary, however.

40. *The failure to give notice did not invalidate the probate decree as to appellants who appeared and contested, even though some of the heirs never appeared.*

Flood v. Kerwin, 113 Wis. 673; 89 N. W. 845; 7 Pro Rep. Ann. 672;
O'Dell v. Rogers, 44 Wis. 136;
Board of Supervisors v. Mineral Point R. R. Co., 24 Wis. 93;
Rice v. Hosking, 105 Mich. 303; 63 N. W. 311;
Jones v. Roads, 74 Ind. 510;
Lewis v. Luckett, 32 App. D. C. 188;
Reese v. Nolan, 99 Ala. 203; 13 So. 677;
Walker v. Jones, 23 Ala. 448;
In re Fay's Will, 1 Tuck. (N. Y.) 405;
Hines v. Hines, 137 S. W. (Mo.) 774;
Section 1306, *Code of Civil Procedure;*

Sampson v. Sampson, 64 Cal. 326;
In re Garcelon, 104 Cal. 570;
Ricketson v. Richardson, 26 Cal. 149;
McKinley v. Tuttle, 34 Cal. 235.

In deciding this point upon statutes and a state of facts in all respects the equivalent of those here claimed, the Supreme Court of Wisconsin has, in its decisions above cited, unequivocably negatived the position taken by appellants and has always consistently held that a decree probating a will is valid and binding as to those who appear and contest notwithstanding any failure of notice or service thereof, and lack of appearance of other parties in interest.

Flood v. Kerwin, 89 N. W. 845, dealt with a probate decree wherein the appellant who had appeared and contested the will set up the invalidity of the probate on the ground that there had been no sufficient notice of the hearing for the probate of the will there involved, and that certain heirs of the decedent had failed to appear and join in the contest. The court held that there had been no sufficient showing of the service of notice as to parties in interest not appearing, but decided that this was no cause for reversal upon appeal by those who appeared and contested, and in so deciding used the following language:

> "The case is quite similar, in the particular mentioned, to O'Dell v. Rogers, 44 Wis. 136. In that case it was held that 'where the proper

> county court, after a hearing at the time and place duly appointed therefor, has admitted a will to probate, issued letters testamentary to the persons named in it as executors, etc., the proceedings, while invalid as to persons not duly notified who did not appear or assent to them, and have done no acts of ratification, are valid as to all who were duly notified, or who appeared or assented to them.' (Cases cited.) We must hold that the court had jurisdiction as to such parties as appeared in the case, including the appellant."

Rice v. Hosking, 63 N. W. (Mich.) 311, considers the point in issue under a statute similar to ours, and reaches the following conclusion:

> "The failure of the probate judge to comply with the statute did not deprive him of jurisdiction which he acquired upon the filing of the petition. Parties interested in the estate were residents of Houghton county. The object of the statutory notice, while the proceeding itself is in nature in rem, is to give the heirs and legatees, and others interested in the distribution of the property of the estate, an opportunity to be heard. * * * Although the notice may be insufficient, and the proceedings declared void upon seasonable objection by a party in interest who has not waived it, yet an appearance will waive the defect, and bind all those who so appear."

In *Reese v. Nolan,* 99 Ala. 203, 13 So. 677, it was held under a statute similar to ours that the contestant in a proceeding for the probate of a will cannot object to the validity of such probate on the ground that one of the next of kin was not cited.

In *Walker v. Jones,* 23 Ala. 448, it was likewise decided that when one of the heirs at law appears and contests the validity of a will, he will not be allowed to assign for error that there were other resident heirs who were not duly notified, and who did not appear.

Appellants have cited a number of cases for the purpose of sustaining their contention that the appearance of a part only of the heirs of decedent was wholly insufficient to give the court jurisdiction to pronounce any judgment whatsoever binding upon appellants or any one else. The case primarily relied upon is the *Estate of Cobb,* 49 Cal. 599. There is nothing in that case from which any one can draw the conclusion it is cited to support. The court there held under Section 1306 of the Code of Civil Procedure prior to its amendment in 1873, that the action of the court in entering judgment in that case was *erroneous* because the court had proceeded to hear the petition for the probate of the will without proof of service of notice upon the heirs in accordance with the requirements of Section 1306 of the Code of Civil Procedure—several of the heirs not appearing to the

proceeding, and says that this was an *error*. The court there did nothing more than any court of equity would do upon the failure to join necessary parties. It has always been the practice of courts of equity when the record shows the absence of a necessary party, to require the joinder of such party upon penalty of dismissal, and such action will be taken by the court *sua sponte*. Furthermore, if such defect of parties is first noticed by an appellate court it will reverse and remand the cause for the purpose of permitting such parties to be joined.

Thus it is said in *Minnesota v. Northern Securities Company*, 184 U. S. 199, 235:

> "The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit, is founded upon clear reasons, and may be enforced by the court, *sua sponte*, though not raised by the pleadings or suggested by the counsel."

The estate here involved was one over which the Superior Court could take jurisdiction and the will had been presented to it for probate. It therefore had jurisdiction of everything necessary to a decision when the cause was set for hearing, except jurisdiction of the parties, and under the authorities already cited it obtained jurisdiction of all

parties who appeared. Appellants' contention therefore amounts to no more than an objection to the lack of proper, or at most, necessary parties. That such a nonjoinder cannot be taken advantage of in this proceeding is well settled. Thus it is said in *Hines v. Hines,* 147 S. W. (Mo.) 776, dealing with a decree annulling a will where a like objection was made to the nonjoinder of parties:

> "We hold that the judgment of the circuit court of Caldwell county annulling the will of Matilda A. Higgins is final, and the validity of such will cannot be relitigated in this action. It would produce an intolerable condition of affairs if parties were permitted to litigate and relitigate the same facts in different actions. To suffer such a thing to be done would be to make of the courts instruments of oppression; and 'the law's delay', considered both in ancient and modern times as one of the most aggravating evils which mankind is forced to endure, would then become utterly unbearable.
>
> "If there was a defect of parties in the will contest, that issue could have been raised in that action; but it was not. The true rule is that all matters which could have been properly adjudicated in that action are res adjudicata when the same matter is sought to be relitigated in another action."

Appellants undertake to strengthen their argument in support of this proposition by citing a list

of cases to the effect that a joint judgment void as to one party for lack of jurisdiction over the person must be treated as an entirety and consequently void as to all parties. Whatever may be the law in other jurisdictions, such a proposition cannot find support under the laws of California. The case of *Junkans v. Bergin,* 64 Cal. 203, is not at all in point. The judgment there was entered by the clerk without any action of the court, and was of course entered by the clerk under the express provision of the statute which authorized him to enter judgment only in case "all the defendants have been served and have failed to answer".

The true rule as to joint judgments is set forth in *Ricketson v. Richardson,* 26 Cal. 149, and *McKinley v. Tuttle,* 34 Cal. 235, where it is held that even in a direct proceeding in the same action, the reversal of a joint judgment as to one of the parties does not vacate such judgment as against a party who fails to join in the appeal; from which it must follow that even joint judgments are not treated as such an entirety in this jurisdiction as to render a judgment void against one party invalid as to all. Furthermore, the interests of heirs and claimants under a will are not as a matter of substantive law joint, but are rather several in their nature as to each other, and there is nothing in the probate statutes of this state which requires them to be treated as other than several in a probate proceeding.

Section 1333 of the Code of Civil Procedure expressly permits a severance of proceedings for the probate of wills as to minor heirs, and it is also likewise held by the Supreme Court of this state that the interest of minor heirs is so severable that a successful contest of the probate of will by a minor heir who has not lost his right by limitation, operates to vacate the probate decree and set aside the will only as to such minor alone and does not vacate the decree as to persons *sui juris* and other minor heirs who have lost their right by limitation. Such is the decision of the Supreme Court in *Sampson v. Sampson,* 64 Cal. 327.

Appellants seek to avoid the principle announced in that case by a quotation from the *Estate of Carpenter,* 127 Cal. 582, to the effect that parties to a will contest cannot arbitrate the controversy. A reading of the extract on page 585 of the report will reveal the fact that it is merely dictum, premised by the remark that the facts which would call for such a decision did not exist. The quotation is also in direct conflict with the underlying principles announced *In re Garcelon,* 104 Cal. 570, where it is decided in effect that the interest of an heir is sufficiently severable to enable him to waive any right which he may have to contest the probate of a will disposing of his ancestor's property. In that case the agreement was made with the testator himself but it was held that the executor stood in such relation to the testator as to enable him to

claim the benefit of the waiver, and appellant's contest was dismissed.

Appellants have also cited *Estate of Smith,* 122 Cal. 462, in support of their position. But that case is obviously not controlling here because it deals with the powers of administrators to waive the rights of those whom they represent, which are limited in this respect to a few special cases. The rights involved in that case were not as in the matter under consideration, severable in any sense of the word. And the rights of the parties who there sought to obtain an adjudication by consent could not be determined independently of the rights of those over whom the court had no jurisdiction.

We therefore conclude from the foregoing principles, that the Superior Court obtained jurisdiction of the subject-matter in the proceeding to probate the will in suit and likewise acquired jurisdiction over the appellants here so that the decree of probate, as to them at least, was valid jurisdictionally, whatever may be its effect upon any person who may not have appeared.

41. *Continuances and Transfer of Probate Proceeding.*—We do not think the averments of the bill setting up a transfer from one department of the Superior Court to another and alleging continuances *sine die* can be taken very seriously as jurisdictional objections.

42. *The continuance of the hearing in the probate proceeding and transfer to another department of the same court constitute no objection to the jurisdiction of the court in that proceeding.*

In re Warfield's Will, 22 Cal. 51; 83 A. D. 49;

Estate of Davis, 151 Cal. 318, 324;

Field v. Apple River etc. Co., 31 N. W. (Wis.) 17;

Roberts v. Flannagin, 32 N. W. (Nebr.) 563.

Undoubtedly such an objection does not reach the jurisdiction of the court, even if there had been no attendance by appellants. This conclusion was reached by our Supreme Court *In re Warfield's Will,* 22 Cal. 51, 58, and was stated in the following language:

> "It does not appear that the will was probated on the day specified in the notice, nor that the probating was adjourned from that day to the day when it was in fact done. But this was, at most, an irregularity, occurring after jurisdiction had been acquired, and could only be objected to on a direct proceeding to set aside the probate."

That decision was followed in the *Estate of Davis,* 151 Cal. 318, 324, where it was approved in the following language:

> "This court has held in Estate of Warfield, 22 Cal. 51 (83 Am. Dec. 49), that where a no-

> tice of time and place of probating a will was given, the failure to adjourn the hearing from the time fixed in the notice to a later day when the matter was in fact taken up, was, 'at most, an irregularity, occurring after jurisdiction had been acquired'. We see no reason for departing from the rule so declared."

The two cases cited above from Wisconsin and Nebraska disclose the fact that the same view of the law is taken in those jurisdictions, and so far as we can find, there are no adjudications to the contrary. We therefore conclude that this objection to the jurisdiction of the Superior Court to admit the will to probate is not well taken.

43. *Formal Sufficiency of Will Res Judicata.*— It is also argued that the will is void on its face because not lawfully dated, and, consequently, the probate decree based thereon is also void. This feature of the case cannot now be litigated, even if this court had jurisdiction to decide the question, because the Superior Court has put that matter at rest by its final judgment.

44. *The validity of the will cannot be questioned in this suit, however lacking in formalities, because the decree of the probate court is res judicata as to its due execution.*

Fouvergne v. City of New Orleans, 18 How. 470;

Parker v. Brown, 6 Gratt. 554;

Robinson v. Allen, 11 Gratt. 785;
Horton v. Barto, 107 Pac. (Wash.) 191;
Wall v. Wall, 28 Miss. 409;
Bryan v. Nash, 66 S. E. (Va.) 69;
Vanderpoel v. Van Valkenburgh, 6 N. Y. 190;
Wells v. Stearns, 35 Hun. 323;
Dublin v. Chadbourn, 16 Mass. 433.

It can make no difference in this suit whether the will as executed was in due form and complied with the law in all respects as to olographic wills. The decree of the Superior Court admitting the will to probate is conclusive as to the due execution of such will, and it cannot now be urged that the will was not properly executed. It was within the province and jurisdiction of the probate court, a court of general and exclusive jurisdiction, to determine whether or not the script presented to it as a will had been executed in such form as to entitle it to probate, and the affirmative decision of the court on this point cannot be questioned. It cannot be the law of the State of California that when a script is presented to the Superior Court and admitted by it to probate, thereby establishing the due execution and formal validity of the instrument probated, it can afterwards be decided, by other courts administering either common law or equity, that the decision of the probate court upon issues peculiarly and exclusively within its province is a nullity to be disregarded, notwithstanding the stat-

utes of this state have asserted that such an adjudication shall be conclusive. If appellants' contention in this regard be true, it becomes the duty of every court passing upon titles based upon decrees of probate to determine whether or not the will was lawfully and properly executed. But the law imposes no such duty upon courts of equity and common law after the will has been probated. They are required by law to accept the decision of the probate court upon this issue as *res judicata* and conclusive. This is especially true of the federal courts.

Thus it was decided in *Fouvergne v. City of New Orleans,* 18 How. 470, 473, that the federal courts will not consider objections to the legal sufficiency of an instrument as a will where the same has been admitted to probate. In that case appellant made various objections to an instrument which had been probated as a will and urged that "the legal formalities were wanting which were necessary to its validity" as a will. But the Supreme Court of the United States refused to consider such objections, and in doing so used the following language:

> "That question, in our opinion, is closed by the decree of the alcalde. That decree declares the will to be valid and subsisting, and directs its execution. We are obliged to treat the decree as the judicial act of a court of competent jurisdiction. In fact, it was the only judicial

authority in the province of Louisiana, except that exercised by the governor.

"This decree remains in full force, never having been impeached, except in this collateral way. The courts of the United States have no probate jurisdiction, and must receive the sentences of the courts to which the jurisdiction over testamentary matters is committed, as conclusive of the validity and contents of a will."

So in the case of *Robinson v. Allen,* 11 Gratt. 785, the court had before it a will appearing upon its face to have been made by a married woman but which had regularly been admitted to probate in the proper court. But the court refused to consider whether or not the will upon its face was valid because this point had already been concluded by the decree of the probate court, which was held to be binding. In discussing the point the court there used the following language:

"It is well settled by the decisions of this court, that the sentence of a court of probate, of competent jurisdiction, admitting a will or writing in nature of a will, to probate, is conclusive evidence of the due making thereof, and that it cannot be denied in any collateral proceeding touching the will; that its validity can be tested only by resorting to the means provided by law for that specific purpose."

The same conclusion was reached in *Parker v. Brown,* 6 Gratt. 554, where a will came before the court collaterally which had been admitted to probate notwithstanding the fact that it was attested by only one witness, and it was argued there as here, that the probate was void because of the informality of the execution of the will. The Supreme Court of Appeals of Virginia held, however, that the probate decree was decisive of the validity of the will and that the issue cannot be again adjudicated.

In *Horton v. Barto,* 107 Pac. 191, 194, the same point was made and disposed of as follows:

> "It is contended that the will of Annie Collins is void because of a failure to comply in its execution with section 4596, Ballinger's Ann. Codes & St., which provides: 'Every person who shall sign the testator's or testatrix's name to any will by his or her direction shall subscribe his own name as a witness to such will, and state he subscribed the testator's name at his request.' It is argued that the will upon its face bears evidence of having the name of the testator subscribed thereto by some person other than herself and hence there should have been indorsed thereon a statement by the person so subscribing the testator's name as provided by this section. We regard this contention as presenting only a question which was before the court upon the probating of the will

> and which might have been again presented to the court within the year allowed for contesting the will. Section 6110, Ballinger's Ann. Codes & St. The probating of a will is a judicial act, and as such it cannot be avoided or set aside save in the manner provided by law."

In *Wall v. Wall,* 28 Miss. 409, 413, an instrument on its face purporting to be a deed had been admitted to probate notwithstanding the fact that it had not been executed with all the formalities required of a will, and it was sought in that suit to question the validity of such instrument as a will notwithstanding it had been probated. But the Supreme Court of Mississippi held that this could not be done, and in so deciding used the following language:

> "It cannot be denied that it was entirely within the jurisdiction of the probate court to pronounce whether the paper was a will or not; and no principle of law is more firmly settled than that, however erroneous as a legal judgment that decision may be, it cannot, while it stands in full force and unreversed, be called in question in a collateral proceeding, because that court had the power to settle the question. And this rule has been often declared by courts of the highest authority, and frequently in reference to judgments the most palpably erroneous, but within the jurisdiction of the courts which rendered them."

Wells v. Stearns, 35 Hun. 323, 324, states the principle involved succinctly in the following language:

> "The will proven included this writing as part of it, and if the adjudication was erroneous it became without an appeal the law of the case even if it be not the law of the land."

In view of the fact that the jurisdiction of the superior courts of this state sitting in probate is in rem, general and final and immune from collateral attack, it seems clear from the foregoing authorities that the decree probating the paper propounded as the last will and testament of Jacob Z. Davis, deceased, cannot now be declared or treated as void for lack of proper execution whatever might have been the conclusion reached upon appeal from the probate decree. The question involved in deciding the validity of an instrument offered as a will is not one of jurisdiction. The Superior Court had jurisdiction to decide whether or not the instrument constituted a will, and even if the instrument propounded had shown on its face that it was not sufficient as a will, the Superior Court nevertheless retained its jurisdiction to decide that proposition, and its decision however erroneous, is therefore not subject to collateral attack for want of jurisdiction.

Appellants undertake to maintain the negative of this proposition by the citation of cases from Georgia and Pennsylvania. Whatever may be the

basis of those decisions, whether it be because probate decrees are there rendered by courts of inferior and limited jurisdiction, or because it is not within the province of such probate courts to decide upon the validity of the will, such decisions cannot in any event be accepted as the law of this jurisdiction because the Superior Court of California sitting as a court of equity or common law, certainly cannot claim any superiority over itself sitting as a court of probate, to determine whether or not a will has been duly executed. And under Sections 1333 and 1908 of the Code of Civil Procedure making probate decrees conclusive as to all issues determined by such decree, the decree becomes the law of the particular case and conclusive as to the validity of the will whatever informalities may have existed.

Upon familiar principles of *res judicata* we therefore conclude that the question whether or not the will was properly executed is no longer an open one and cannot now be considered by this court.

45. *The Will is However Properly Dated and Valid on its Face.*

Estate of Chevallier, 159 Cal. 161;
Estate of Plumel, 151 Cal. 79;
Estate of Clisby, 145 Cal. 408;
Estate of Fay, 145 Cal. 82;
Estate of Lakemeyer, 135 Cal. 28;
Ladd's Estate, 94 Cal. 670;
Estate of Soher, 78 Cal. 478;
Estate of Skerrett, 67 Cal. 586;

Estate of Billings, 64 Cal. 427;
Estate of Barton, 58 Cal. 538;
Succession of Robertson, 49 La. Ann. 868; 21 So. 586; 62 Am. St. Rep. 672.

If the court should see fit to examine the point raised by appellants' questioning the validity of the will on the ground that it was not properly executed because not sufficiently dated, an examination of the cases cited here will show conclusively the groundlessness of appellants' objection and likewise prove the will to have been duly executed. The briefs heretofore filed by appellees have already discussed the law on this point fully and made use of the cases here cited. We shall therefore submit this point without further discussion since appellants are without any authority whatsoever militating against the cases cited.

46. *Disqualification of Jury.*—It is alleged that four of the jurors in the will contest were disqualified because of active interest in appellees' success. Upon this averment appellants ask the court to decide that such a state of facts would render the probate decree void for want of jurisdiction.

47. *A Disqualification of any or all of the Jury Who Tried the Will Contest Does Not Affect the Validity of the Probate Decree.*

Dimes v. Grand Junction Canal, 3 H. L. Cas. 759, 785;
Phillips v. Eyre, L. R. 6, Q. B. 1, 22;

Heydenfelt v. Townes, 27 Ala. 423;
McMillan v. Nichols, 62 Ga. 36;
Moses v. Julian, 45 N. H. 52; 84 A. D. 114 and note;
2 Pollock & Maitland's Hist. Eng. Law, pp. 541, 623, 665;
Foreman v. Hunter, 59 Ia. 550; 13 N. W. 659;
Clark v. Drain Commissioners, 16 N. W. (Mich.) 167;
Johr v. People, 26 Mich. 427;
Mize v. Americus Co., 34 S. E. (Ga.) 583.

A great many cases are cited to the effect that a decree or judgment rendered by a judge disqualified by reason of an interest in the subject matter of the suit or decree to be rendered therein, is void. The result in all these cases is based upon statutory enactment and is contrary to the common law rule. At common law, however deeply interested a judge may have been in any proceeding pending before him, his decision or judgment was not for that reason void, but was at most voidable. Thus it is said in *Dimes v. Grand Junction Canal,* 3 H. L. Cases 759, 785:

> "I have to state the unanimous opinion of the judges, that in the case suggested the order or decree of the Lord Chancellor was not absolutely void on account of his interest, but voidable only."

The same conclusion was reached in *Phillips v. Eyre,* L. R. 6 Q. B. 22, where it is said:

> "In the latter, as a rule, the judgment of an interested judge is voidable and liable to be set aside by prohibition, error, or appeal, as the case may be; but it is not absolutely void, and persons acting under the authority of such a judgment before it is set aside by competent authority would not be liable to be treated as trespassers."

So it was said in *Moses v. Julian,* 45 N. H. 52, which was a case where the judge who admitted a will to probate was a party in interest:

> "At common law the recusation of a judge does not affect the jurisdiction, but is merely ground to set aside the judgment on error or appeal (cases cited); except in cases of inferior tribunals, where no writ of error or appeal lies. The language of statutes may be such as to render the proceedings void (cases cited); otherwise, in courts of common law jurisdiction, they are generally voidable only (cases cited)."

Assuming then that the jurors stood upon the same basis as a judge in relation to the proceedings before them (which of course is not true) the judgment in this case would not be void because there is no statutory enactment imposing such a conse-

quence against judgments rendered upon verdicts returned by disqualified jurors.

The jury occupies a relation to the judgment altogether different from that of a judge. Although the verdict constitutes the basis for the judgment, it is, however, no part of the judgment and must be approved and adopted by the court before any judgment can be entered thereon; and this is peculiarly true of special verdicts, such as are rendered in will contests. Any irregularity in the jury rendering the verdict cannot therefore be treated as sufficient to render the judgment void. Thus it is said in *Foreman v. Hunter,* 59 Ia. 550, 13 N. W. 659:

> "A judgment rendered by a disqualified jury is erroneous, but not void. It might be reversed upon appeal, but it cannot be disregarded as nullity. In Cooley's Constitutional Limitations (2nd Ed.) 410, it is said: 'Even the denial of jury trial in cases where that privilege is reserved by the constitution does not render the proceedings void, but only makes them liable to be reversed for the error.' "

To the same effect is the case of *Clark v. Drain Com'rs,* 16 N. W. (Mich.) 167, where the case last cited is approved and the following language used:

> "Complainant was present when the jurors were chosen. He took no exception, but on the

contrary aided in striking the panel, and declared himself satisfied with it."

The rule under consideration is also well stated by Judge Cooley in *Johr v. The People,* 26 Mich. 426, 429, in the following language:

"Neither our constitution nor our statutes regard it as essential to the protection of the rights of parties in civil cases, that they should have their controversies determined by jury, or, that if they do, the jury should be the common-law tribunal of twelve. The party may not only assent to a trial by less than twelve, but he may wholly waive the jury, and the statutes go even further, and hold him to have waived the right whenever he has not expressly demanded it: Com. L. 1871, Sec. 4961. This being the case, it is not improper to hold the party insisting upon his right to a common-law jury of due competency, to strict vigilance in guarding the right, while the jury is being impanelled. Neither the officers of the court nor the court itself, is under the same obligation of caution and vigilance in the protection of his interests that the law expects in cases of alleged felony, and he is justly expected to ascertain by his own inquiries whether the jurors are such as he is satisfied with or not. If he sees fit to rely upon the evidence of competency afforded by the fact of their being summoned, he may, with the utmost propriety, be held to

> this election. It is not a mistrial in his case, as it would be in case of felony; but it is at most only an irregularity which he might have discovered and obviated by the proper vigilance. The time for him to make the necessary inquiries into the qualifications of jurors, is before the trial, and not afterwards."

To the effect that the verdict itself as distinguished from the judgment is not rendered void by reason of the disqualification of jurors returning it, see the case of *Mize v. Americus, etc. Co.,* 34 S. E. (Ga.) 583, 584, where it is said:

> "The fact that a juror who tried a case was disqualified on the ground of relationship does not render a verdict void, but only voidable, and can be set aside only in the method prescribed by law."

48. *Summary of Jurisdictional Objections.*— This completes a review of appellants' objections to the validity of the probate decree on jurisdictional grounds. The Supreme Court of this state has unanimously decided that the probate decree is valid on its face (*Estate of Davis,* 151 Cal. 318, 363), and as appears from this review of appellants' objections they have alleged nothing whatsoever off the record affecting the jurisdictional validity of the decree. We shall therefore proceed to consider other features of the case.

II.

Probate Decree Made Without Extrinsic Fraud.

49. *Introductory.*—Having shown that the probate decree possesses all the necessary jurisdictional requisites, we come now to a consideration of the alleged acts of fraud and the sufficiency of such averments to entitle the appellants to any relief in this suit. Waiving for the nonce all questions of equity jurisdiction in this action, and treating the probate decree from the standpoint of an ordinary judgment, we will undertake to show that all the averments in the bill, taken both separately and as a whole, do not come within the principle contended for and were therefore finally and conclusively determined against appellants by the probate court.

50. *Alleged Fraud Wholly Intrinsic.*—We have already set forth the substance of appellants' averments on this point, and it is now sufficient to say that when taken with every intendment in their favor, they consist of the alleged forging of the will, the alleged perjured testimony in support of its probate, the alleged destruction of certain documentary evidence and the alleged suppression of oral testimony refuting the validity of the will and alleged misconduct preventing a fair jury trial; and that all these things were done secretly and pursuant to a conspiracy.

51. *Forgery of Will, Perjury, Destruction and Suppression of Evidence Constitute Intrinsic Fraud, and a Judgment Procured by Such Means is Conclusive and Binding, Even in Equity.*

State of California v. McGlynn, 20 Cal. 233; 81 A. D. 118;
Langdon v. Blackburn, 109 Cal. 19; 41 Pac. 814;
Tracy v. Muir, 151 Cal. 363, 370;
Del Campo v. Camarillo, 154 Cal. 647, 662;
Broderick's Will Case, 21 Wall. 503;
United States v. Throckmorton, 98 U. S. 61;
Baker v. Wadsworth, 67 L. J. Q. B. N. S. 301;
Flower v. Loyd, L. R. 10 Ch. Div. 327;
Pico v. Cohn, 91 Cal. 121.

52. *Alleged Forgery Not Extrinsic Fraud.*— This court is already too familiar with the decisions cited to require quotation therefrom in support of this point, and no authority has been cited by appellants to the contrary. *Broderick's Will Case,* 21 Wall. 503, and *State of California v. McGlynn,* 20 Cal. 233, are the leading cases in this country to the point that the forgery of a will does not constitute extrinsic fraud for which the decree probating such forged will can be questioned. These cases have been accepted as the settled law in every case where the point has arisen. Nothing therefore remains for inquiry on this point except to determine whether or not the additional charges of per-

jury, destruction and suppression of evidence when joined with the charge of forgery can operate to take the case out of the rule there announced.

53. *Alleged Perjury Not Extrinsic Fraud.*—Obviously the probate of a forged will could hardly be obtained in the absence of perjury because the witnesses to the due exception of a will are required to identify the instrument and swear that they as well as the testator executed the writing. It must also be true that in every such proceeding the truth is concealed and suppressed, and it would be hard to imagine a case where the facts were not embodied in some form of evidence which must also have been likewise concealed and suppressed. It certainly can make no difference whether the concealment was accomplished by hiding, disguising or the absolute destruction of the instruments of evidence or the actual evidence itself. It must follow, therefore, that these cases which deal with the question of forgery alone are also good authority in this suit in which the alleged concomitant facts are also urged. We have, however, taken the trouble to collect cases dealing specifically with the incidental wrongs which exist in every case involving forgery and perjury, such as conspiracy, concealment, suppression and destruction of evidence. To these cases we now invite the court's attention.

54. *Alleged Conspiracy Not Extrinsic Fraud.*—In dealing with allegations of conspiracy in a complaint identical with the bill here, it was decided by

our Supreme Court in the case of *Tracy v. Muir,* 151 Cal. 363, 373, that such allegations could not be relied on or used to constitute extrinsic fraud, and in coming to such conclusion used the following language:

> "The allegations as to conspiracy add nothing to the legal effect of plaintiff's complaint. The sum and substance of that complaint is that she has been deprived of property to which she would have succeeded as heir, by means of a false and forged will, established in the court having the jurisdiction to determine as to its validity by prejured testimony. Whether or not the forgery and perjury were the result of a conspiracy appears to be entirely immaterial in determining her rights to pursue the property in the hands of the beneficiaries. We are unable to see, as suggested by counsel for plaintiff, that such a conspiracy could operate to change what would otherwise be intrinsic fraud into extrinsic fraud."

55. *Allegations of Concealment and Destruction of Evidence Insufficient.*—The allegations in the bill relative to the suppression or concealment of the testimony state merely a negative and less vicious form of perjury, and since perjury can not be used as the basis of relief against the judgment, the suppression of testimony is therefore likewise unavailable. Such was the adjudication in *Del Campo v. Camarillo,* 154 Cal. 647, 662, where it is said:

"The fraud here complained of consisted of producing this will to the court, introducing evidence establishing its due execution and in avoiding a disclosure of the alleged attempted revocation and fraudulent preservation thereof. All these were facts relating to the validity of the will, which was the very fact to be then determined by the court. This character of fraud comes within the same class as perjured testimony or the fraudulent production and proof of a false will previously forged. The only remedy for a fraud so committed is the remedy afforded by the probate statute, that is to say, a proceeding to contest the will and to revoke the probate thereof, which under section 1327 of the Code of Civil Procedure may be begun within a year after such probate. This short limitation is made in order to prevent the unsettling of titles and the re-opening of contests over estates of deceased persons."

The same conclusion is stated in *Volume 6 Pomeroy's Equity Jurisprudence,* Section 656, where it is said that "to the average mind it will seem that an act of falsehood is stronger ground for relief than passive concealment". Furthermore, in this case appellants and appellees occupied the position of adversaries in the probate proceeding and appellees were therefore under no duty whatsoever to disclose to appellants any evidence in their favor.

Thus it is said in *6 Pomeroy's Equity Jurisprudence,* Section 654:

> "Fraudulent concealment is some times relied upon as a ground for equitable relief against judgments. In order that concealment shall be ground for any equitable relief, there must be a duty to disclose. Ordinarily when there are two parties on an equal footing before the court there is no such duty."

Parties to litigation cannot be adversaries and at the same time under a duty to disclose to each other, because the moment that duty arises the law forbids the adversary litigation and estops the parties from claiming against each other.

56. *No Fiduciary Relation Between Parties to Will Contest.*—Appellants try to avoid the operation of the principle just stated by arguing that Mrs. Curtis by virtue of her appointment as special administratrix of decedent's estate became a trustee for the heirs, and that consequently the alleged frauds under consideration and which, under all the authorities, must unquestionably be treated as intrinsic, thereby became extrinsic and, therefore, constitute the basis for equitable relief.

In this connection it is contended that until the probate decree was rendered the decedent must be considered as having died intestate and that prior to the entry of said decree the estate must be considered as property belonging to decedent's heirs,

and that since Mrs. Curtis was special administratrix during that time, she therefore became an express trustee for the heirs of decedent. This conclusion is obviously erroneous for two reasons. In the first place it is well settled law that when a will is admitted to probate the decree operates by relation and takes effect as of the date of the death of decedent and enables the will to vest title in the devisees and legatees from and after decedent's death, as effectually as if they had taken as heirs.

In the second place a special administratrix is not a trustee for only those claiming as heirs, but is a special trustee for the persons who may eventually be entitled to the estate upon distribution, whether such persons be heirs, devisees or creditors; and no authority is needed to refute the contention that a special administratrix appointed before a will is admitted to probate is under any duty to take sides in a will contest or aid any one to establish his rights in the estate whether he claims such rights as heir or as devisee.

Furthermore, a special administratrix is at most a special trustee and is under no duty whatsoever towards even the persons whom it may ultimately be decided are entitled to the property except to care for the property and preserve it intact. Such a duty can in no wise estop a special administratrix from asserting any beneficial interest which she may have in the estate against any adverse claim-

ant of such estate whether such claimant bases his title upon a will or under the law of succession.

The cases cited by appellants in support of their contention on this point are wholly inapplicable. There is, of course, no disputing the proposition that a trustee after his appointment cannot acquire an interest in the subject of his trust adverse to his beneficiary, but such a rule of law certainly does not prevent a special administratrix or any other person holding property for unknown or unascertained beneficiaries from asserting and establishing according to forms of law the fact she is herself the beneficiary for whom she holds; and this is especially so where she does not receive her appointment from any one claiming as beneficiary and never in any wise acknowledges any one other than herself to be a beneficiary, having received her appointment and authority thereunder at the hands of a court of justice on the theory no doubt that she was herself the real beneficiary and was taking the estate to preserve it for her own ultimate benefit. If the position contended for by appellants were true, a special administrator, an executor or a receiver of an estate, would be estopped from asserting and establishing against the estate which he represents any and all rights and claims whatsoever which he might have had in or against it prior to assuming his trust.

The case of *Sohler v. Sohler,* 135 Cal. 323, is cited by appellants. But this case does not rest the duty

to disclose facts upon the delinquent party there because she occupied the position of executrix, but because she was the mother and guardian of minor children who were defrauded. Hence it is said in the opinion on page 327:

> "As executrix merely, it might be argued that she was a disinterested party, having no concern whatsoever in the question of heirship or right of distribution, standing indifferent between the parties, and interested only in carrying into effect the determination of the court upon these questions. But, as the mother and natural guardian of these plaintiffs, her position was a very different one."

It was because of this duty imposed upon her both by nature and by municipal law giving her the guardianship of her minor children that her acts of concealment which prevented the minor heirs from appearing in the proceedings for distribution of the estate, were declared to be extrinsic fraud. The fraudulent acts there set up were moreover of a type altogether different from those in this suit. The fraud there was such as to prevent the parties in interest from appearing in court and claiming their rights; whereas, the alleged fraud averred here consists in a failure to disclose testimony pertinent to the issues.

In *Wingerter v. Wingerter,* 71 Cal. 105, cited by appellants, no claim to the estate was made by the administrator adversely to the heir and he had al-

ways acknowledged that he was trustee. There is nothing in that case which undertakes to say that the administrator was under any duty whatsoever to disclose to the heir any defects or objections in any claim which he held against the estate or to the effect that in so far as any such claim was concerned, he was not entitled to all the rights and remedies in its prosecution which he would have had if he had not held the position of administrator; or that his position as such administrator imposed any duty whatsoever upon him to disclose evidence to his adversaries.

It is also argued by appellants that appellees, Mrs. Muir and Mrs. Curtis, by reason of having taken possession of the property of decedent, became trustees *ex maleficio* or *de son tort,* and were by reason of this relation under a duty to appellants to make a full disclosure of all the facts in the suit. As appears from the bill, Mrs. Curtis, during the will contest, held possession of the estate as special administratrix. Appellants have, notwithstanding, argued in their brief that both Mrs. Curtis and Mrs. Muir occupied the relation of executrices *de son tort* in relation to said estate prior to the probate of the will. Even if such a legal conclusion could be drawn from the averments of the bill, their duties to appellants flowing therefrom were no greater than or different from those imposed by the special letters of administration. The latter argument of appellants asserting a duty on the part of appellees

to disclose said alleged acts of fraud and misconduct, must fail for the same reasons which we have already stated against the preceding argument based upon the duties of Mrs. Curtis as special administratrix.

Mrs. Muir and Mrs. Curtis at the time of taking such property, and ever since that time, have claimed the same as beneficial owners and, by virtue of the will in suit, have always denied any right whatsoever in appellants. They cannot therefore be regarded as ever having been under any fiduciary duty whatsoever to disclose any facts which they might have ascertained relative to the estate of decedent and the devolution thereof.

57. *Intrinsic Fraud no Basis for Relief.*—Appellants go further, however, and conceding for the sake of argument that the alleged fraud under consideration is intrinsic, they insist vehemently that decrees probating wills are distinguishable in this respect from other judgments; and that the law applicable to them constitutes an exception to the general principle of law in relation to other judgments which prevents the re-examination of any issue once litigated and decided. This contention is based upon the provisions of Section 4 of an act passed by the Legislature of California on March 3, 1862 (Stats. of California 1862, p. 27), which provides that the District Court shall have power

> "to set aside a decree of any probate court admitting to probate any supposed will, when

such decree has been obtained by fraud, concealment or perjury".

It is argued that this statute is still in full force and effect and that its provisions enable a court of equity to consider the evidence relating to the issues tried in will contests, and to determine whether or not the decision of the probate court upon such issues was obtained by forgery and perjury or destruction and concealment of evidence. In other words, it is contended that probate decrees are subject to review and trial *de novo* in courts of equity in this jurisdiction; and this, too, notwithstanding the fact that our statutes provide a perfect and ample procedure for the contest of wills before probate, and further provide for and authorize a likewise ample and complete remedy for the contest of wills one year after probate, and have also clothed the Superior Courts in such proceedings with all the powers and process known to either law or equity for the purpose of affording a full and adequate hearing of every issue relating to the validity of wills. It is appellants' contention, briefly stated, that a will contest, like the proverbial cat, is endowed with many lives and cannot be put to final rest until after many adjudications upon the same issue. Such a proposition is not the law.

Whatever may have been the proper construction of the section under consideration, it is no longer operative so far as this point is concerned, because

it is in this respect contrary to the express provisions of Section 1908 of the Code of Civil Procedure, and, if not before, was undoubtedly repealed by the enactment of the latter section in 1872. This section deals with the legal effect of judgments, including the probate of a will, as follows:

> "The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:
>
> "1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person.
>
> "2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding."

This section gives to probate decrees not only all of the conclusiveness extended to judgments in general, but a great deal more. How then can it be argued that they are subject to re-examination because of intrinsic fraud contrary to the universal rule which prevents a re-examination of issues once litigated and determined. In order to make this contention, appellants not only disregard the general principle of law announced in the statute above quoted, but argue contrary to the fundamental maxim of probate law announced on every hand that estates should be settled without delay, the rights of parties therein speedily determined and all questions in connection therewith speedily put to rest. Appellants' position cannot therefore be considered as well taken.

58. *Breaking of Cinerary Urn.*—The allegations of the bill relative to the breaking of the cinerary urn containing the ashes of decedent's wife, cannot be regarded as fraud either intrinsic or extrinsic which in any way affects the probate decree, for the simple reason that that fact was not relevant or material to the issues there presented. If as alleged in the bill, the will is not in fact genuine and was not found in the urn, then of course it is wholly immaterial whether the same was broken or preserved intact. If, on the other hand, it is a fact that the urn contained the script which appellants have so often and so far so vainly assaulted, then how can appellants urge that appel-

lees Mrs. Muir and Mrs. Curtis committed a wrong by discovering the evidence which enabled them to come into acknowledged ownership of that which was rightfully theirs?

59. *Character of Alleged Evidence Suppressed Immaterial.*—Throughout the discussion of this feature of the case we have, for the sake of argument, accepted appellants' statement and contention to the effect that any evidence alleged to have been destroyed or suppressed was of the tenor and effect attributed to it by the bill. We have for that reason not seen fit to answer the many pages of argument of appellants' brief addressed to that point, because as appears from the cases cited, it is not the amount but the quality of the alleged fraud that determines this question. No amount of intrinsic fraud, under the law of this jurisdiction, can constitute a basis for relief in equity, even though such intrinsic fraud consists in suppressing or destroying evidence which was, in fact or under the adverse presumption arising from spoliation, of the most conclusive character.

60. *Alleged Fraudulent Jury.*—Having discussed those averments of alleged fraud which have been the subject of frequent judicial decision, we shall now take up those allegations of misconduct in relation to the jury, and will at the outset endeavor to establish the proposition that the alleged misconduct complained of does not constitute such fraud as entitles appellants to relief here.

In the first place, the alleged misconduct of appellees Mrs. Muir and Mrs. Curtis in this regard, is stated to have been accomplished before the jury was accepted and sworn to try the cause. There is no presumption of law or fact that because the name of a juror is called by the clerk he is qualified. The law and practice of this state gives to every litigant the right to examine a juror and either to decide for himself or to have the court decide for him concerning his qualifications and competency. Appellants have averred merely that said jurors *falsely represented themselves* to be disinterested and qualified jurors without alleging that they were even examined on their *voir dire* or that a single thing was done by appellants to try the issue of competency as to any of such jurors. If they were willing to accept said jurors on the mere fact that these jurors were called and took their seats, they cannot now complain, even if such appearances were false, because they had no right to rely upon them. Furthermore, since the objections assigned were a ground of principal challenge, and were in issue before the court in the presence of both parties, which issue was determined in the affirmative, even though by perjured testimony, appellants have, nevertheless, had their day in court upon such issue; and there is nothing whatsoever to distinguish the false swearing by the juror, if false swearing there was, from the alleged false testimony of any other witness in the cause. If, therefore, perjury on the other issues in the case

is no ground for relief in equity, how can it be contended that perjury supporting this issue constitutes the basis for equitable relief after the decision on this point became final; especially in view of the fact that it is only fraud apart from or collateral to any issue in the case which will support equitable relief?

The averments of this bill must not be confused with those cases where jurors have been corrupted after and not before they had been accepted and sworn to try the cause. In those cases there is, of course, ordinarily no opportunity to raise an issue to determine the legal consequences of such misconduct and the principle of *res judicata* and rule as to intrinsic fraud can have no application. If, however, misconduct of parties in relation to the jury is presented to the trial court and an issue made and trial had thereon by way of motion for new trial or otherwise, and an adverse result thereon is obtained by false affidavits, then we would have a case parallel to the one in suit. In such cases, however, it is clear that equity will grant no relief because the fraud is not extrinsic as defined by such courts.

Matson v. Field, 10 Mo. 100;
Collins v. Butler, 14 Cal. 223.

The allegation that the clerk called the names of the jurors as though they were on the jury list, when if as alleged they were not, is of no aid to appellants in this connection. The trial jury list and

the officer's return thereon were matters of record in the probate proceeding and the jury list selected by the judges of the Superior Court was also a matter of public record. Knowledge, or negligence equivalent to knowledge, of the alleged fact that four of the jurors who tried the will contest were not on the jury list, must therefore be attributed to appellants (*Quinn v. Wetherbee,* 41 Cal. 247) and they cannot be heard at this time to allege their ignorance of such alleged fact. The bill expressly alleges the existence of the trial jury list for this particular cause, and negatives any conclusion that the jurors in said probate proceeding could have been summoned upon an open venire. The lack of diligence in this respect will be taken up later under the head of laches. The showing on this point would be insufficient, we think, to justify the granting of a new trial even in the probate proceeding itself, and certainly is wholly insufficient as a fraud upon which this court could declare a trust, because such fraud or irregularity as would entitle a litigant to a new trial is not of itself sufficient to preclude the guilty party from asserting his rights whatever they may be, since the punishment imposed for such delinquency does not consist in depriving a litigant of his legal rights.

This concludes our discussion of the various allegations of fraud and misconduct charged by the bill against appellees, and brings us to a consideration of the power of the court below to take jurisdiction of and decide these issues.

III.

Probate Decree Conclusive in Equity.

61. *Introductory.*—Assuming, however, that all the alleged frauds and alleged misconduct averred in the bill, do constitute such extrinsic fraud as would in the case of ordinary judgments entitle appellants to relief in equity, we have yet to inquire whether or not this court can afford any relief in a suit of this kind, and to that end, it becomes necessary, at the outset, to determine the scope and extent of the jurisdiction of the federal court in this case over the probate of wills, and those issues of fact which must be decided to determine whether decedent died testate or intestate. In doing so, we shall undertake to determine: whether the federal courts of equity, unaided by any statutory provision, have the power to grant the relief sought, and if not, whether the original equity jurisdiction of the court has been enlarged by statutory enactments.

62. *Equity has no jurisdiction to grant relief against the probate of a will on the ground of fraud, in the absence of statute, because the granting of such relief would compel courts of equity to decide issues within the exclusive jurisdiction of probate courts.*

State of California v. McGlynn, 20 Cal. 233;
81 A. D. 118;
Broderick's Will, 21 Wall. 503;
Farrell v. O'Brien, 199 U. S. 89;

Carrau v. O'Calligan, 125 Fed. 657; 60 C. C. A. 347;
Langdon v. Blackburn, 109 Cal. 19;
McDaniel v. Pattison, 98 Cal. 86;
Estate of Walker, 160 Cal. 547.

All these cases declare that such decrees stand upon a different basis than other judgments, and it is asserted generally that the probate of a will cannot be set aside upon the ground of fraud.

It becomes material, then, to determine the extent and scope of the exception so frequently recognized, and to ascertain the nature of this distinction so far as equity jurisdiction is concerned.

63. *Is Lack of Jurisdiction Due to Lack of Remedy?*—Is it a lack of method merely, or is it a want of jurisdiction of the subject matter that differentiates a will probate from other judgments? The distinction certainly can have nothing whatsoever to do with the method of procedure, since courts of equity cannot *set aside* even judgments at law, because they have no jurisdiction over those courts or their records and could not actually *set aside* their judgments any more effectively than they could a decree probating a will.

Thus it is said in *II Freeman on Judgments,* 4th Ed., Section 485, p. 848:

> "When relief is granted in chancery from a judgment at law, the interference is in all cases indirect. The judgment is not canceled nor

vacated, nor is the court of law nor its judge enjoined from proceeding, nor is a new trial granted in express terms."

To the same effect is *I Black on Judgments*, Section 357.

A court of equity is likewise without jurisdiction to *set aside* a probate decree of distribution just as it is without power to vacate judgments at law or those of any other separate, distinct and co-ordinate tribunal. In such cases it is the practice to let the judgment stand and enjoin its execution, or if it passes title, to declare the guilty party a trustee and compel him to convey the legal title. This method of procedure is based upon the fact that courts of equity have no supervision or control over other courts of co-ordinate jurisdiction, and therefore cannot act directly upon their judgments and decrees, but must always act *in personam* upon the parties to the judgment alone.

This indirect method is therefore the usual every-day course of procedure. The much talked of exception accorded to a will probate as distinguished from other probate decrees and ordinary judgments, must undoubtedly rest upon something more than the mere method adopted in granting relief, and it must be clear when it is said in all the cases that the probate of a will cannot like ordinary judgments, be set aside, such language is used in a general untechnical sense and unquestionably means that such a decree cannot be set aside by the usual

method of declaring the guilty party a constructive trustee.

To pursue the subject further, it cannot be said that a method of granting relief constitutes an exception or distinction when such method is used in all cases. It would be simply trifling with words if a court of equity should state that it could not set aside the probate of a will, but that it could declare the guilty party a trustee and should then declare that it could set aside ordinary judgments, when such a procedure is the only method it could possibly adopt in granting relief in those cases. Evidently the immunity of decrees probating wills cannot be destroyed by any such quibble of words.

64. *No Form of Fraud Can Vitiate a Will Probate in Equity.*—Since the difference in the power of equity over will probates as distinguished from other judgments in relation to fraud cannot be found in dissimilar methods of procedure, let us see if the distinction lies in the nature or amount of fraud required to bring into operation equity jurisdiction.

In the case of ordinary judgments, equity will, if the fraud be *extrinsic,* grant relief by appropriate remedy; otherwise not. Does the same rule hold true of the probate of a will? If so, and such a probate can be set aside for fraud in its procurement, then the courts have after all been merely applying the general rule and were altogether mistaken when they stated that they were dealing with

an exception. This cannot be true, because common sense teaches us that if the probate of a will can be set aside for extrinsic fraud practiced in its procurement, just as in the case of ordinary judgments according to every day methods, all the learned chancellors and jurists would not be repeating in unqualified terms for two centuries, that equity is without jurisdiction to afford relief against the probate of a will procured by fraud.

Briefly stated, we interpret such language to mean simply this, that the probate of a will cannot be set aside directly or indirectly by equity for fraud even in its procurement, because in order to set aside any kind of a judgment for fraud or to raise a trust, the court of equity must first determine whether or not the fraud works injury, that is, must decide that the guilty party has no cause and should have failed, and that the complaining party has a good cause and should have succeeded, and to do this in the case of a probate decree a court of equity would be required to decide all the issues touching the due execution and validity of the will involved.

At the time equity jurisdiction grew up and until it had reached its final maturity, it was not called upon to decide such an issue, for the reason that the entire law of wills was within the exclusive province of ecclesiastical jurisdiction until the Statute of Henry VIII provided for the devise of real property, and even then equity refused to take ju-

risdiction of issues connected with the execution of such wills. It therefore came about that equity jurisdiction was so definitely defined and limited that its lack of power to determine one way or the other the issue of testacy or intestacy, has never been doubted.

Thus it is said in *I Story's Equity Jurisprudence,* 13th Ed., p. 195, note:

> "It is now well settled that a Court of Equity will not entertain jurisdiction to set aside a will obtained by fraud, or establish a will suppressed by fraud, whatever relief it may otherwise grant under special circumstances."

And likewise in *Allen v. McPherson,* 1 H. L. Cas. 191:

> "The law says that the Court of Chancery has not jurisdiction over a will of personal property; it cannot set aside a probate of personal property. Well, then, if you are not allowed to file a bill to set aside the probate, shall you be allowed, in every instance, to file a bill to declare the party in whose favour the probate is granted to be a trustee for the next of kin, or for some other party? Wherever you wish to find fault with the probate which the Ecclesiastical Court has granted, you have only to file a bill and to pray that the party in whose favour the probate has been granted may be declared a trustee. Nay, my Lords, by this process you might review the sentence of the

> Ecclesiastical Court in *refusing* probate; because, let me suppose that the Court refuses probate, and grants administration to the next of kin, then, the Court having refused probate and granted administration to the next of kin, the party who claims under the will would file his bill, and would pray that the next of kin may be declared to be trustees for the legatee, and in that manner you might in every instance have an appeal from the Court of Probate to the Court of Chancery."

To the effect that this is still the law in California, see,

McDaniel v. Pattison, 98 Cal. 86;
Estate of Walker, 160 Cal. 547.

It cannot be disputed that the trial court would have to consider and settle the issue of forged or valid will in this case before it could raise an involuntary trust and compel a conveyance. If then, equity has no jurisdiction to determine an issue of testacy or intestacy at all in the first instance *before* probate while the question is still an open one, from what mystic source can it conjure up the power to reopen such an issue after it has become *res judicata* and decide it in flat contradiction of the decree of a court established and constituted by the sovereign with exclusive jurisdiction over such issues? That the trial court has no authority to do so is made plain by the often quoted statement from the

McGlynn case, repeated in *Langdon v. Blackburn,* 109 Cal. 19, 26, as follows:

> "The court of chancery has no capacity, as the authorities have settled, to judge or decide whether a will is or is not a forgery; and hence there would be an incongruity in its assuming to set aside a probate decree establishing a will, on the ground that the decree was procured by fraud, when it can only arrive at the fact of such fraud by first deciding that the will was a forgery. There seems, therefore, to be a substantial reason, so long as a court of chancery is not allowed to judge of the validity of a will, except as shown by the probate, for the exception of probate decrees from the jurisdiction which courts of chancery exercise in setting aside other judgments obtained by fraud. But whether the exception be founded in good reason or otherwise, it has become too firmly established to be disregarded. At the present day it would not be a greater assumption to deny the general rule that courts of chancery may set aside judgments procured by fraud, than to deny the exception to that rule in the case of probate decrees. We must acquiesce in the principle established by the authorities, if we are unable to approve of the reason. Judge Story was a staunch advocate for the most enlarged jurisdiction of courts of chancery, and was reluctant to allow the exception in cases of

wills, but was compelled to yield to the weight of authority."

The only case in the English reports in any wise approaching the result sought by appellants, is the case of *Barnsley v. Powell,* 1 Vesey, Sr. 284, and the only case in this jurisdiction either state or federal that even remotely suggests such a thing is *Patterson v. Dickinson,* 193 Fed. 328.

In the first case, a will disposing of both real and personal property came before the chancellor after a jury trial on the issue of *devisavit vel non,* finding the will to be a forgery, but it further appeared that the legatee had obtained its probate in the ecclesiastical court by fraudulent practices. The chancellor did not, however, decide that there was no will and declare a trust, but compelled the forger to consent to a readjudication of his rights in the ecclesiastical court. The situation there was one which could not arise in this jurisdiction. The will had been presented to both tribunals having jurisdiction and was held by one after contest to be a forgery, but had been probated by the other by consent obtained through fraud. Such a state of facts would naturally invite the chancellor to exercise his jurisdiction to the fullest to grant all possible relief, but even with the determination of a lawful tribunal to sustain him he declared that he was nevertheless without power to determine the validity of the will.

This is the case cited by Professor Pomeroy for the statement in Section 919 of his equity treatise, to the effect that equity has jurisdiction to set aside the probate of a will for fraud in its procurement. The remaining half dozen cases which he cites are not even remotely in point, as will appear from the opinions delivered by the House of Lords in *Allen v. McPherson,* 1 H. L. Cas. 191; 9 Reprint 727, and as there appears, those cases deal with questions which determine the scope, effect and legal operation of the will and in no wise involved issues relating to the making, execution or existence of the document involved as a valid will.

The case of *Patterson v. Dickinson,* 193 Fed. 328, decided by this court on February 5, 1912, does not aid appellants in any way. The court was dealing with the probate of a foreign will in that case and was not in any sense of the word called upon to determine whether or not a will existed, that issue having been previously settled for the court of equity by the probate court of the State of Missouri. The opinion calls attention to the distinction between that case and *Tracy v. Muir,* 151 Cal. 363.

It must appear, therefore, from all the authorities, that this trial court is without jurisdiction to adjudicate the rights of the parties in this case, unless it is possessed of something more than the ordinary equity jurisdiction.

65. *Statute of March 3, 1862.*—It is argued, however, quite vehemently and at great length by

appellants, that whatever may have been the scope and extent of equity jurisdiction as it originally existed to grant relief against probate decrees, that jurisdiction has been so effectually enlarged by an act of the legislature of this state of March 3, 1862, as to enable the trial court to grant the relief prayed for.

66. *Section 4 of an Act Passed by the Legislature of California, March 3, 1862, (Stats. Cal. 1862, p. 27) was Unconstitutional and has Been Repealed.*

Constitution of California, 1849, Article VI, Sections 6 and 8;

Constitution of California 1849, Article VI, Section 8, as amended September 3, 1862;

Statutes 1849-50, p. 217;

Statutes 1850-53, pp. 377, 420, 421, 585, 586, 742;

Statutes 1855, p. 132;

Statutes 1861, p. 630;

Statutes 1863, pp. 335, 338, 346;

Code of Civil Procedure, Part III, Title XI;

Constitution of 1879, Art. VI, Sec. 5;

Code of Civil Procedure, Sec. 18;

Code of Civil Procedure, Secs. 1333, 1908;

I Sutherland Stat. Const., Sec. 270;

Pulaski County v. Downer, 10 Ark. 590;

Page v. Ellis, 18 Mass. 43;

People, ex rel. v. Peck, 157 N. Y. 51; 51 N. E. 412;

Mack v. Jastro, 126 Cal. 130;
Hamberlin v. Terry, 8 Miss. (7 How.) 143.

67. *Synopsis of Probate Law Prior to the Codes.* —A reference to the foregoing sections of the constitution and statutes of this state will disclose the fact that originally probate jurisdiction was vested in the inferior courts of this state. The Constitution of 1849 gave the county judge jurisdiction of surrogate or probate matters and made provision for the trial of issues of fact in will contests before the district court. The statutes not only followed the constitutional provisions but also provided that the district courts should have appellate jurisdiction in will contest cases and should try such contests *de novo,* but the Supreme Court held this provision of the statutes unconstitutional for the reason that the constitution gave the district courts no probate jurisdiction (*Deek v. Gherka,* 6 Cal. 669).

This was the condition of the law at the time the statute under consideration was enacted. A few months after the enactment of this statute, Article VI of the Constitution of 1849 dealing with the judicial department of the state government, was amended and the various courts of this state, both superior and inferior, were reconstructed with their jurisdiction defined anew. Pursuant to the new constitution the legislature enacted a new statute which undertook to define the scope and extent of the jurisdiction of each of the courts so established in detail (Stats. 1863, p. 33). This statute purports to be general and compre-

hensive in its terms, and it is provided in Section 89 thereof that all prior acts concerning the courts of justice of this state and judicial officers are thereby repealed. Under the constitutional provisions as amended, and the Act of 1863 in conformity therewith, a separate probate court was established and given exclusive jurisdiction of probate proceedings including the probate of wills. The district courts were nowhere given authority in any probate matters whatsoever, and their jurisdiction was confined to suits in equity and actions and special proceedings at law. The provisions of Section 6 of Article VI of the Constitution as originally enacted, and authorizing the district courts to try issues of fact joined in the probate court, was *ex industria* omitted, and as a consequence the Supreme Court held in the *Matter of Bowen,* 34 Cal. 682, that the district courts possessed no jurisdiction of probate matters after the amendment of the Constitution of 1862 and the enactment of the Act of 1863, and the same conclusion was reached in the *Matter of Tomlinson,* 35 Cal. 508.

68. *Constitutionality of Statute of 1862.*—The section under discussion deals with that branch of the law of wills which belongs exclusively to the probate jurisdiction. In the first clause it is provided that the district court shall have power to set aside a will obtained by fraud or undue influence, and to declare null and void any paper purporting to be a last will, and to establish a will lost or de-

stroyed. These provisions are clearly the subject of probate jurisdiction, and under the Constitution of 1849 as originally enacted, were clearly unconstitutional as constituting an attempt to confer probate jurisdiction upon the district court contrary to the express provisions of Article VI, Section 8 of the constitution which bestowed jurisdiction of such matters upon the county court.

As already pointed out, and as is recognized by the terms of this statute, a probate decree could not be set aside without passing on the validity of the will; and since the statute was undoubtedly unconstitutional and inoperative to bestow the power to try this probate issue on the district court, it must be held likewise inoperative to vest the power to grant relief based upon the trial and determination of such an issue.

This conclusion cannot be avoided by simply designating the subject matter of this statute as equity jurisdiction. Appellants seek to do so, however, by arguing that as equity has jurisdiction of fraud generally, the frauds mentioned in this statute are therefore in a jurisdictional sense, matters of equitable cognizance. But both equity jurisdiction and probate jurisdiction, so far as fraud is concerned, each had a well defined meaning in 1849 when our state constitution clothed the district court with equity jurisdiction and bestowed exclusive jurisdiction of probate matters upon the county courts. As already pointed out, equity juris-

diction did not include this species of fraud, because it had been often declared by the courts that it belonged exclusively to the probate jurisdiction.

We therefore conclude that the statute never had any validity even at the time of its enactment; but, be that as it may, it has undoubtedly been repealed.

69. *Statute of 1862 Repealed.*—If the provisions of the statute under consideration be considered as valid at the time of its enactment, it was certainly repealed by the statute of April 18, 1863 (Stats. 1863, p. 335, 338, 346), which as we have already pointed out was enacted pursuant to the constitutional amendment of 1862, and which in accordance with that amendment, divested the district courts of such probate jurisdiction as they possessed prior to that time and vested it exclusively in the probate courts. A glance at this statute makes it apparent that it was the purpose of the legislature to cover the subject dealt with completely, and establish a judicial system in accordance with the constitutional amendment which had vested all probate jurisdiction in a separate and distinct tribunal. It must follow, therefore, that whatever jurisdiction the section under consideration which may have given to the district courts in relation to the probate of wills, was effectually divested by the constitutional amendment referred to and the statutes enacted in accordance therewith.

If it should be thought, however, that the constitutional and statutory enactments just reviewed

did not constitute a repeal of the statute under discussion, it certainly did not survive the code legislation of 1872.

The Code of Civil Procedure adopted at that time undertook to cover the subject of the estates of deceased persons and provided a remedy and procedure for every possible right which could arise in connection with such estates, including the law of escheats. The law of escheats enacted in the statute under consideration was likewise embodied in the Code of Civil Procedure but the section in suit was omitted, showing the undoubted intention of the legislature to repeal the same so far as it had any relation to that subject.

The same code not only provided generally a complete procedure for the administration of estates, including the probate of wills, but contains a chapter dealing specifically with will contests *after probate,* and is therefore shown not only to have dealt with the subject in a general way, but descended into the very particulars which, it is claimed, are covered by the statute in controversy. It therefore appears that the legislature possessed the intention to provide for will contests, and, as appears from Sections 1327 to 1333, did so very elaborately.

That such legislation operated to repeal the section in suit cannot be doubted. A great many cases could be cited, but we think a few will suffice. Thus it is said in *I Sutherland Statutory Construction,* Section 270:

> "Where one act is framed from another, some parts taken and others omitted * * * the later act operates without any repealing clause as a repeal of the first."

The same principle is announced in *Pulaski County v. Downer,* 10 Ark. 590, where it is said:

> "The authorities are abundant to support the proposition that where the legislature takes up a whole subject anew, and covers the entire ground of the subject-matter of a former statute, and evidently intend it as a substitute for it, the prior act will be repealed thereby, although there may be no express words to that effect, and there may be in the old act provisions not embraced in the new."

It is also said in *Page v. Ellis,* 18 Mass. 43, 45:

> "It is a well settled rule, that when any statute is revised, or one act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled. To hold otherwise would be to impute to the legislature gross carelessness or ignorance; which is altogether inadmissible."

To the same effect see *People ex rel. v. Peck,* 157 N. Y. 51.

The rule is also recognized and announced in *Mack v. Jastro,* 126 Cal. 130.

The Supreme Court of Mississippi had occasion to consider this very question in *Hamberlin v. Terry,* 8 Miss. (7 How.) 143, where the following language is used:

> "Prior to the adoption of our present constitution, there was a statutory provision which authorized any party interested within a given time to file his bill in chancery to set aside a will, whereupon an issue was directed to be made up to try the validity of the will. But this was not a matter of equitable jurisdiction; on the contrary, it is testamentary in its character, and when the constitution gave to the probate courts full jurisdiction in all matters testamentary and of administration, this power was of course included in that general grant; and as the jurisdiction of the probate court is also exclusive, it follows as a matter of course that the law alluded to was virtually repealed by the constitution."

Appellants seek to avoid this principle by asserting that the scope and effect of Section 1333 making probate decrees conclusive was limited by the section in dispute at the time of its adoption into the code, and must therefore be regarded as still subject to such limitation, although that section which appellants contend covers the same subject-matter was *ex industria* omitted. This position cannot be correct, because, as pointed out by the authorities just cited, the very effect of the omission was to relieve

Section 1333 of any limitation which may have been imposed upon it by the omitted section.

The effect of Section 1908 of the Code of Civil Procedure upon the statute in controversy has already been considered and will not be repeated here.

We conclude from the foregoing that the entire law of California governing the probate and contest of wills was embodied in the codes, and that the section relied on was not only unconstitutional when enacted but has since been repealed. Hence the jurisdiction of equity in this suit stands now just as it did when *State v. McGlynn* was decided.

IV.

Appellants' Suit Barred by Laches.

70. *Introductory.*—We are now brought to a discussion of those features of the record which, according to our view, disclose such laches as must prevent a recovery by appellants in the absence of the objections which we have already urged against their suit. In the treatment of this subject, we shall set forth briefly the pertinent allegations of the bill and discuss the equitable principles governing such a state of facts.

71. *No Facts Alleged Excusing Delay.*—A lapse of more than ten years after the transaction of the alleged wrongs transpired before the bringing of this suit. During all that time it appears consist-

ently throughout the bill that the principal fraud, the whole basis of the wrong complained of, the cause without which there could be no dispute or litigation whatsoever, to wit, the alleged forgery of the will in suit, the alleged perjured testimony and the alleged facts accompanying decedent's death, were all known to appellants. This statement must be true in view of the fact that appellants contested the validity of the will prior to probate on that issue, and if, as they there maintained, the will was a forgery, it is an irresistible conclusion that they must have known the alleged concomitant facts of perjury, fraudulent intent, conspiracy, concealment of the truth and consequently concealment of the evidence which would have established the truth according to their contention.

72. *Allegations of Ignorance and Discovery.*— Appellants seek, however, to avoid the consequences of such delay by averments of ignorance of the law of California relating to wills and their rights in the estate involved, and also of the law relating to the constitution and procedure of the Superior Courts as well as the various supposed legal objections to the record in the probate proceeding. So much for matters of law. Ignorance is also asserted of the alleged interest and disqualification of certain jurors, together with the want of knowledge of certain alleged evidence tending to establish the alleged forgery. It is further averred that this

ignorance as to the law and jury was not dissipated until June 25, 1906 (shortly after the Conflagration of April, 1906), when appellants began anew their litigation in the state courts. It is alleged, however, that knowledge of the alleged pertinent evidence was not discovered until 1908. Except as to the testimony of W. H. Senderling, it nowhere appears how that certain attorney who communicated these things to appellants ascertained such facts. Likewise it does not appear that knowledge of all those things could not have been obtained at the time the will contest was pending by the same means that they were later discovered. There is also no allegation that appellants ever took the depositions of appellees or sought by any other means to obtain a discovery of the facts in dispute.

73. *Legal Consequences of Delay.*—This showing is, we submit, wholly insufficient to take the case out of the operation of the equitable principle of laches in view of the fact that the period of limitation provided by law has long since expired and the burden was on appellants to bring forward in their bill facts excusing the delay.

It is not knowledge of the evidence and means by which the principal fraud complained of is accomplished that imposes upon a litigant the duty to prosecute his supposed rights, but knowledge or its equivalent of the principal fraud itself. It is a familiar maxim of equity jurisprudence dealing with knowledge and notice, that sufficient knowledge to put

a reasonably prudent person upon inquiry as to a principal fact is the full equivalent of knowledge itself. If that be true, then must it not necessarily be true, even to a greater degree, that when knowledge of the principal fraud exists no amount of ignorance of the evidence by which such fraud can be established will serve to excuse delay? This must be so for the simple reason that when the principal fraud is known, equity stands ever ready with its remedies for discovery to supply any such alleged want of proof. It was, therefore, the duty of appellants to come at once into court after knowledge of the principal fraud and obtained the alleged facts which were, as they aver, without their knowledge.

Even if the things of which appellants aver ignorance constituted the substance and basis of their complaint, the lack of knowledge of such things would not constitute a sufficient excuse in this case. With the exception of the suppression of the testimony of W. H. Senderling and the alleged destruction of certain documentary evidence, every want of knowledge set forth consists either in matter of law or of record in the will contest to which appellants were parties, even to the jury list which would have informed them of the alleged fact that four of the jurors were not summoned as such to try the case, but were, as alleged, imposing upon the court. Appellants will not be heard to say that they were ignorant of the alleged con-

cealed evidence, because the law imposes upon them the duty to ascertain that knowledge, and put in their hands the means of doing so; and their failure constitutes such negligence as amounts to actual knowledge. Their averments of ignorance as to the law cannot on well settled principles, be considered, and in this respect it is immaterial that they resided outside the state, because they were present in the state and participated in the probate proceeding by means of their attorneys and agents. It therefore appears, that the lapse of time began to operate against appellants' alleged rights at the time the alleged wrongs were consummated.

The question of laches must be determined upon the peculiar facts of each case as it arises. The statute of limitations provided for in the ordinary case of fraudulent practices is three years after the discovery. But different limitations are provided for various special kinds of fraudulent practices. In case of fraudulent practices in connection with jury trials the right to relief by direct application to the court in the same proceeding is limited to a very brief period, not exceeding a few days. So if relief from a judgment is sought upon the ground of prejudice in the jury or irregular or fraudulent misconduct of one of the parties in connection with the jury, the application for relief against such wrongs must be made within ten days. And if application be not made within such time, in the absence of excusable ignorance, no relief can

be had either at law or in equity. Thus we have in such a case a period of limitation different from the usual three year period, and altogether distinguishable, based upon obvious grounds of public policy as well as justice to litigants.

If, however, through accident, mistake, ignorance or other reason, resort can be had to equity for the purpose of accomplishing what could have been done in the original proceeding, why should not courts of equity insist in some measure upon the same diligence after discovery as would have been required by positive rule of law in the original proceeding after notice of the facts?

Applying this principle then, to the averments with reference to the jury which in the probate proceeding itself would have come within the purview of the remedy given by way of new trial requiring the liveliest diligence, we think this court should declare a delay of more than two years after the discovery of the alleged fraudulent jury practices such laches as will prevent it from affording any relief on that ground (*Allen v. Currey,* 41 Cal. 318).

Taking up the averments of the bill with reference to the alleged fraud connected with the merits of the case in the probate proceeding, and applying the same principle, a period of two years delay is likewise sufficient to prevent appellants from obtaining any relief in this suit. The statutes of this state give parties in interest one year after the pro-

bate of a will to contest its validity. If, then, they are able to show some excuse why the time specified for such contest should be delayed, on what grounds can they insist after the discovery of those facts which are sufficient to start the time running, that they are entitled to more than the statutory period after such discovery?

The statute limiting the time to contest wills must be accepted as conclusive here, because, as pointed out in the case of *Bartlett v. Manor,* 45 N. E. (Ind. Sup.) 1060, the whole subject of the law of wills is the creature of statute depending upon legislative enactments for its existence, and subject to any and all limitations which the legislature may see fit to impose. And the same is likewise true with reference to the law of succession. There is, therefore, nothing in any constitution to prevent the state itself from claiming as heir in all cases. If, then, it sees fit to regulate the devolution of property through wills in a particular manner, who can be heard to complain? If the state wishes to limit the right to inherit property by imposing upon heirs the duty to contest successfully invalid wills within one year after the probate thereof or to be forever foreclosed, can equity interpose and set aside the plain intent of the law?

In the case last referred to the statute limiting the time for the contest of wills was compared to other statutes which limit the time for bringing an action to assert a right created by statute, and it

was there decided that a statute like the one in suit, limiting the time to contest wills, operated just as any other similar statute, such as those limiting the time within which to bring an action under the Federal Employers Liability Act and the usual statutes creating a liability for death, and thereby destroyed the cause absolutely, leaving no right to be litigated either in law or in equity after the expiration of the time provided. In other words, it was decided that when the state gave to any one a right or an interest in the estate of a decedent, such right was to be measured by the statute, including the statutory provision limiting the time within which to assert such right, and that an exception could not be created by courts of equity.

74. *Decedent's Last Illness.*—We have already set forth in paragraph 29 of this brief, a complete statement of the averments in the bill dealing with decedent's last illness. We do not believe that it requires argument to refute the sufficiency of these allegations to charge a capital crime.

Furthermore, so far as the bill shows, appellants have always had knowledge of these alleged facts; and if they ever constituted any cause for relief, such cause has long since become barred.

It must therefore follow, that the lapse of time has long since barred any cause appellants may have had long before the institution of this suit whichever statute of limitations may be accepted by the court as the correct rule by which to measure laches in this suit.

V.

Deeds Not Subject to Rescission.

75. *General Discussion.*—The bill contains no averment whatsoever of any fraudulent misrepresentation to appellants in connection with the execution and delivery of the deeds in suit. All the averments of misconduct relate wholly to the probating of the will. The only allegation offered to distinguish the position of appellants at the time the deeds were executed from the position they now occupy, is the general statement in the bill that they were ignorant of the alleged misconduct in connection with the probate of the will. But this averment does not and cannot, in view of the entire statement of the cause, permit the conclusion that appellants made the deeds without knowledge of the alleged forgery, perjury and other alleged misconduct which comprise the real *gravamen* of the alleged fraud. On the contrary, it appears expressly, and always inferentially throughout the bill, that they not only knew but asserted those essential alleged wrongs. It must therefore follow, under familiar principles of equity making partial knowledge of any alleged fraud the equivalent of complete knowledge that appellants are, in fact, in no other or different situation at the present time than they were when the deeds were executed and delivered.

Under such a state of facts it will require the citation of no authorities to support the position

that appellants are wholly without any equitable remedy to set aside the deeds in suit, because the surrender of quiet and peaceable, though wrongful, possession of property constitutes a valuable consideration for a deed; but if it did not, it would make no difference because a deed without consideration made with knowledge of the facts, or its equivalent, is sufficient to vest absolute title when the possession of the property conveyed has passed to the grantee. If with knowledge, or means of knowledge, appellants saw fit to deed away the property to which they claim title, it would constitute at least a gift which they could not afterwards rescind. Such a statement of course, puts the situation in the most favorable light for appellants, but if such were the real state of facts, their claim would, nevertheless, be without equity.

For the reasons set forth herein, the decree, we think, should be affirmed.

Respectfully submitted,

J. C. Campbell,

Walter Shelton,

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